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MEGAREGIONALS AND THE OTHERS SYMPOSIUM

An Indian perspective on megaregionals and concomitant trends

ABHIMANYU GEORGE JAIN — 17 June, 2016

I am grateful for the opportunity to participate in this symposium and would like to congratulate the MegaReg team on their efforts to draw attention to a fascinating series of developments in international law, and the authors of the working papers on providing thoughtful commentaries to form the basis of these analyses.

In their papers, Professors Eyal Benvenisti and Richard B. Stewart draw out some common themes relating to the interactions between states in the negotiation and formation of international legal norms. One such theme is the

diminished ability of more powerful states to set terms in larger multilateral fora. Another is the consequent movement of more powerful states to entrench norms of global import in smaller bilateral and regional fora. A third is the success of these efforts in defining baseline norms which then circumscribe the policy and negotiating positions of smaller, less powerful states in bilateral and multilateral negotiations.

These are powerful insights with great intuitive resonance. In this post I shall attempt to substantiate and explore these insights through factual examples from India, thereby meeting one of the goals of this symposium: to analyse the effect of mega-regionals on third-party developing countries, like India.

The difficulties of multilateral decision-making – India and the WTO Trade Facilitation Agreement

The magnified power of smaller states in multilateral negotiations and international organisations is sometimes linked to their ability to band together to resist pressures from more powerful states that might otherwise overwhelm them individually. The history of the UN General Assembly, for instance, is replete with many such examples. Another way in which small or mid-level states can amplify their voices in multilateral fora which rely on consensus-based decision-making is by playing spoiler to extract key concessions. An example of this strategy is the Indian approach to the negotiation of the WTO Trade Facilitation Agreement where India was able to leverage its consent to the trade facilitation agreement to secure concessions on WTO commitments related to food security concerns. Arguably, this was not the wisest strategy (see, e.g., here, here and here) as it led to India being painted as

obstructionist and damaged the institutional credibility of the WTO. It was, nonetheless, effective and suitably illustrates the concerns of more powerful states with regard to international organisations – particularly the difficulty of reaching consensus on contentious issues and the consequent ability of small groups of states to play spoiler.

The relative merits of bilateral engagement – India and IPR

As the sheen of international organisations and multilateral negotiations fades, smaller negotiations with fewer participants may begin to seem more attractive. A fitting example of this in the Indian context is the debate over the global governance of intellectual property rights (**IPR**). Securing Indian commitment to the TRIPS standards was made feasible through the larger give and take involved in the establishment of the WTO. But as Benvenisti has noted, and as India has consistently argued, TRIPS standards and requirements permit considerable leeway for IPR policies and uses that countries like the USA would prefer to prevent. For many years the USA has tried to exert bilateral pressure on India to 'reform' its IPR policies, including through consistent castigation in the United States' domestic Section 301 processes. Almost equally consistently, India has asserted its commitment to exercising the full range of IPR rights available under TRIPS and its reluctance to accept TRIPS-plus obligations – see, e.g., here, here, here, here, here and here. Recently, however, contradictory statements have begun to emerge from the Indian government, conceding alleged 'weaknesses' in Indian IPR laws, and revealing an openness to negotiation – see, e.g., here, here and here. At the same time, India's participation in the US-led trade policy forum elicited praise from the USA (even as India remains on the priority watch list in the 2015 USTR special 301 report),

and subsequently, the USTR (pg. 5) claimed that the "*use of out-of-cycle review helped to secure commitments from India… on a broad range of IP issues*".

To muddy these waters further, over the last two years, the Indian government has been engaged in an effort to articulate a national IPR policy – a process that has been plagued by concerns relating to the constitution and priorities of the committee tasked with drafting the policy. All of this points, troublingly, to a potential dilution of a traditionally strong Indian stand on IPR couched in terms of a legitimate defence of developing country interests. Even more worryingly, this policy shift seems to have been unilaterally engineered by the executive branch of the Indian government.

What has changed that makes India more amenable to cooperating with the USA on IPR issues? Arguably the answer lies in the current Indian government's decision to seek closer relations with the United States, and to the American government's ability to leverage Indian priorities in other areas into concessions on IPR issues. To the extent that the foregoing analysis is accurate, it provides a fitting example of the ability of more powerful states to press their interests in bilateral negotiations – a power that is deployed with greater efficiency and broader impact in mega-regionals like the TPP or NAFTA. (A full timeline of Indian IPR developments (on which the foregoing analysis is based) is available here.)

Universalizing norms through regional and bilateral engagement – India and ISDS

It is possible to aggressively promote norms through bilateral and regional agreements to a point where the norms achieve near universality. A fitting example of this is investor-state

arbitration which has now become ubiquitous in international trade and investment agreements. India entered into its first bilateral investment treaty (**BIT**) in 1994. Until 2010, it was successfully able to settle all investor-state arbitrations initiated against it, but in 2011 it faced its first adverse arbitration decision, in the White Industries case. Subsequently seven more cases have been initiated by foreign investors. The adverse decision in the White Industries case and the rash of subsequent arbitration challenges highlighted the vulnerability of the Indian state and its policies to this unique form of external challenge. Partly in response to this perceived threat, the Indian government decided to pause ratification of all pending investment treaties featuring investor-state dispute settlement mechanisms, and initiated an effort to revise the 2003 Indian model BIT (para 1.7-1.8, here). The first draft of the revised model BIT, released in April 2015, constituted a rather radical departure from prevalent notions of investment protection.

For instance, the draft excluded the full protection and security, fair and equitable treatment and most-favoured national clauses that are usually found in such instruments and restricted the scope of the national treatment obligation to intentional and unlawful discrimination; it limited the scope of remedies against expropriation and circumscribed the scope of compensation available to investors; it restricted the definitions of investors and investment that would qualify for protection; taxation and intellectual property measures were exempted from challenge; and, investor protection was made contingent on compliance with Indian law including labour, human rights and anti-corruption laws, and wide scope was provided for host state counterclaims. The final draft of the model BIT, released in December 2015, though

still ambitious, was markedly more conservative than its predecessor. Limited notions of full protection and security and fair and equitable treatment were introduced, the national treatment obligation and protections against expropriation were broadened, as were the definitions of investor and investment, the requirement to comply with Indian law was significantly restricted, and the availability of counterclaims was abandoned.

All in all, the final version of the model BIT represents a far more conventional and conservative notion of an investment treaty than the first draft, and arguably these changes find their genesis in prevailing investor-friendly ideas of investment arbitration which have been aggressively promoted as valuable norms. The changes between the initial and final drafts are explained in an analysis of the draft text by the Law Commission of India which justified its suggested changes on the basis of the need to protect the interests of Indian investors in foreign countries and to balance that with state's regulatory discretion (e.g., para 1.12 and 2.1.4). Implicit in this analysis is the assumption that investors need or deserve special judicial remedies – an idea that has gained unquestioning acceptance through its repeated use and promotion in bilateral and regional treaties.

Through this post I have sought to expand on certain common themes running through Benvenisti's and Stewart's working papers and to illustrate them through India-specific examples. I cannot claim that these examples unambiguously support these ideas: each of them is certainly capable of alternative interpretations. However, contemporaneous analyses of international relations rarely allow for complete precision or for a lack of ambiguity. Correlation, though not causation, is at least correlation, and the coincidence of the

events and examples outlined above with the broader trends represented by the mega-regionals should provide at least an indication of their possible impact on countries like India.

Abhimanyu George Jain works in London. His other papers can be found here.

This post is part of our symposium "Megaregionals and the Others" that accompanies the ICONS conference at Humboldt University Berlin. Other symposium contributions can be found here.

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